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THE PROGRESSIVENESS OF THE UNITED STATES SUPREME COURT.

During the past two years, there has been much agitation directed against the Supreme Court of the United States, frequent reference to "judicial oligarchy," "usurpation" and the like, and demands for fundamental changes in the judicial system under the Constitutions, not only of the States but of the United States. An evil is alleged to have grown up requiring radical measures for its correction—an evil consisting in the supposed tendency of the National Supreme Court to invalidate by its decisions the liberal and progressive State legislation of the day.

There is grave danger that through constant iteration the truth of this charge will be assumed, and that the discussion will be confined to the form of remedy needed.

The Bar of this country has too long neglected its duty in allowing this charge to take root in the minds of laymen, swayed by unanswered articles in popular magazines and by uninstructed orators on the stump. Unless the Bar and the law reviews set the real facts constantly before the people, a complete misconception of our greatest Court may prevail to the detriment of its influence and of its powers. The falsity of the charge is easily to be proved.

The reformers who claim that the Court stands as an obstacle to "social justice" legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of *Lochner v. New York* decided by the United States Supreme Court in 1905, in which the Court held unconstitutional the bakers' 10-hour day law of New York.¹

Yet a single case does not necessarily prove the existence of an evil. If the evil is as serious as is claimed, it ought to be easy to point out numerous other cases.

The years 1887 to 1911 inclusive have constituted the period most productive of progressive and liberal—even radical—social and economic legislation in the United States. The evil, if it exists, must have grown up during these years and should appear in the decisions of the Supreme Court of the United States in cases arising under the "due process" and "equal protection of the

¹*Lochner v. New York* (1905) 198 U. S. 45.

law" clauses of the Fourteenth Amendment; for under those clauses practically all State legislation of this kind can, sooner or later, be brought before that Court.

The records show that between these years—1887 to 1911 inclusive²—the United States Supreme Court rendered over 560 decisions based on these clauses of the Federal Constitution and involving the validity of State statutes or other form of State action.³ Examination of these 560 cases conclusively proves that the alleged evil in the trend of the Court is a purely fancied one; for out of these 560 there are only two cases (other than the *Lochner Case*) in which any State law, involving a social or economic question of the kind included under the phrase "social justice" legislation, has been held unconstitutional by the Supreme Court. One of these two possible exceptions is the *Connolly Case*⁴ in which the Court, in 1902, held invalid an Illinois anti-trust law because it illegally discriminated in favor of certain classes; the other exception is a case of minor importance—the *Allgeyer Case*⁵—in which, in 1897, a Louisiana law depriving citizens of the right to order insurance by mail from foreign insurance companies was held invalid as an interference with liberty of contract. Even if it be assumed that all three of these exceptional cases were wrongly decided—three cases out of 560—yet any court, or any official body—executive or legislative—which on any particular subject makes only three mistakes in twenty-five years, certainly has a remarkable record. Even the People themselves, in their referendums or recalls, might easily err once every eight years.

The National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type. When this fact is once fitmly grasped, it becomes clear that there is no necessity for the introduction of the new remedy—recall of judicial decisions—or for its application to decisions of State courts on questions involving the "police power" or "social justice." For if any State court be found reactionary or inclined to deny the constitutionality of State laws on social or economic matters, a very simple remedy is at hand—the enactment of a single change in the Federal Judiciary Act,

²United States Supreme Court Reports, Volumes 123 to 222 inclusive.

³In the nineteen years previous—1868 to 1886—there were only 46 cases decided under the same clauses.

⁴*Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540.

⁵*Allgeyer v. Louisiana* (1897) 165 U. S. 578.

a change urged by many lawyers and Bar Associations. The Supreme Court is now confined to passing on only those State statutes whose validity under the Federal Constitution a State court has upheld. If that Act shall be amended so as to provide that an appeal may be taken to the United States Supreme Court on a decision of a State highest court denying the constitutionality of a State statute, the people of this country can, by that very slight change enacted by Congress, be fully protected against any reactionary State courts (if such exist); and practically every State statute involving great social or economic questions can then be quickly and finally passed upon by the Supreme Court of the Nation, whose progressiveness cannot be denied.

The following synopsis of State legislation upheld by the Supreme Court during the past twenty-five years is the best proof of its success in dealing with the new and advancing conditions of modern sociological, economical and business life. Lawyers and laymen alike may well refresh their memory with the actual record.⁶

LABOR LEGISLATION.

The Supreme Court has upheld every State labor statute brought before it under these clauses of the Constitution (with the single exception of the New York 10-hour labor law) as follows:—

Wages, Etc.

8-hour day law of Utah, for miners (1898); Arkansas law requiring payment of all unpaid wages to railroad employees when discharged (1899); Tennessee law requiring redemption in money of store orders, etc., given to employees for wages (1902); Illinois coal mining classification, coal miner's liability, and coal mine inspection law (1901) (1907); Kansas 8-hour law for labor on public works (1903); Ohio mechanics' lien law (1904); 8-hour law for women of Oregon (1908); Arkansas law preventing contracting for wages on basis of screened coal mined (1909); full

⁶This synopsis includes only cases appealed under the clauses of the Fourteenth Amendment. There are of course many State statutes of a similar nature which have been considered by the Court in cases involving only the question whether the statute was or was not repugnant to the Federal jurisdiction over interstate commerce. Such cases will show an equal progressiveness on the part of the Court—the only statutes of this nature which have not been sustained being those which were a direct interference with the powers of the Federal Government over such commerce. The dates given in the text are dates of actual rendering of decisions, not dates of enactment of the legislation.

train-crew law of Arkansas (1911); Iowa law forbidding railroads to deduct insurance benefits from the wages due employees for injury (1911).⁷

Employees' Injuries.

The Supreme Court has upheld every State statute brought before it abrogating or modifying the fellow-servant doctrine—*i. e.*, the outworn doctrine that an employee could not recover damages for injuries due to the negligence of a fellow-employee, as follows:—

Laws abrogating or modifying the fellow-servant doctrine on railroads in Iowa (1888); in Minnesota (1888); in Kansas (1895); in Indiana (1899) (1910); in Mississippi (1911); in Iowa (1911); in Arkansas (1911); general abrogation of fellow-servant rule of Minnesota (1905).⁸

ANTI-TRUST LEGISLATION.

The Supreme Court has upheld every State anti-trust law brought before it under these clauses of the Constitution with one exception (Illinois 1902), and that exception was due simply to the fact that the Illinois act unconstitutionally discriminated in its application between different classes of persons. The following laws have been sustained:—

Anti-railroad consolidation law of Kentucky (1896); anti-trust laws of Texas (1905) (1909), of Kansas (1905), of Arkansas (1909), of Mississippi (1910), of Tennessee (1910); combination law of Wisconsin (1904); law of Iowa against combinations fixing rates (1905); anti-railroad consolidation act of Minnesota (1896).⁹

⁷*Holden v. Hardy* (1898) 169 U. S. 366; *St. Louis etc. R. R. v. Paul* (1899) 173 U. S. 404; *Knoxville Iron Co. v. Harbison* (1901) 183 U. S. 13; *Consolidated Coal Co. v. Illinois* (1902) 185 U. S. 203; *Wilmington Star Min. Co. v. Fulton* (1907) 205 U. S. 60; *Atkin v. Kansas* (1903) 191 U. S. 207; *Great Southern etc. Co. v. Jones* (1904) 193 U. S. 532; *Muller v. Oregon* (1908) 208 U. S. 412; *McLean v. Arkansas* (1909) 211 U. S. 539; *Chicago etc. R. R. v. Arkansas* (1911) 219 U. S. 453; *C. B. & Q. R. R. v. McGuire* (1911) 219 U. S. 549.

⁸*Mo. Pac. Ry. v. Mackey* (1888) 127 U. S. 205; *Minn. etc. R. R. v. Her- rick* (1888) 127 U. S. 210; *Chicago etc. R. R. v. Pontius* (1895) 157 U. S. 209; *Tullis v. Lake Erie etc. R. R.* (1899) 175 U. S. 348; *Louisville & N. R. R. v. Melton* (1910) 218 U. S. 36; *Mobile etc. R. R. v. Turnipseed* (1910) 219 U. S. 35; *C. B. & Q. R. R. v. McGuire* (1911) 219 U. S. 549; *Aluminum Co. v. Ramsey* (1911) 222 U. S. 251; *Minn. Iron Co. v. Kline* (1905) 199 U. S. 593.

⁹*Louisville & N. R. R. v. Kentucky* (1896) 161 U. S. 677; *National Cot- ton Oil Co. v. Texas* (1905) 197 U. S. 115; *Waters-Pierce Oil Co. v. Texas*

LAWS REGULATING SALES OF PURE FOOD AND OTHER MERCHANDISE
AND CONDUCT OF MERCANTILE BUSINESS.

The Supreme Court has upheld every law regulating sales of pure food and other merchandise and restricting conduct of mercantile business, as follows:—

Oleomargarine laws of Pennsylvania (1888), of Massachusetts (1894), of Ohio (1902); pure food laws of Ohio (1903), of New York (1904); sanitary milk law of New York (1905) (1906); law of New Jersey restricting oyster dredging (1907); law requiring paint labels to show ingredients, of North Dakota (1907); inspection fertilizers law of North Carolina (1898); laws of Connecticut (1909) and Michigan (1910) forbidding sales of merchandise in bulk without notice to creditors; law of Oklahoma forbidding sale of certain illuminating fluids (1909); cold storage law of Illinois (1909); Arkansas law forbidding drumming or soliciting business on railway trains (1910); Louisiana law restricting private markets (1891); Louisiana law requiring gaugers on coal and coke boats (1895); law of New York forbidding pumping out natural mineral springs (1911); District of Columbia law forbidding gift and trading-stamp enterprises (1911); Missouri law regulating weight of grain, seed and hay and forbidding deductions (1911); fish and game restriction laws of New York (1894) (1909), of Connecticut (1896).¹⁰

(1909) 212 U. S. 86; *Smiley v. Kansas* (1905) 196 U. S. 447; *Hammond Packing Co. v. Arkansas* (1909) 212 U. S. 322; *Grenada Lumber Co. v. Mississippi* (1910) 217 U. S. 433; *Standard Oil Co. of Ky. v. Tennessee* (1910) 217 U. S. 413; *Aiken v. Wisconsin* (1904) 195 U. S. 194; *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401; *Pearsall v. Great No. R. R.* (1896) 161 U. S. 646.

¹⁰*Powell v. Pennsylvania* (1888) 127 U. S. 678; *Plumley v. Massachusetts* (1894) 155 U. S. 461; *Capital City Dairy Co. v. Ohio* (1902) 183 U. S. 238; *Arbuckle v. Blackburn* (1903) 191 U. S. 406; *Crossman v. Lurman* (1904) 192 U. S. 189; *New York v. Van DeCarr* (1905) 199 U. S. 552; *St. John v. New York* (1906) 201 U. S. 633; *Lee v. New Jersey* (1907) 207 U. S. 67; *Heath Co. v. Voist* (1907) 207 U. S. 338; *Patapsco Guano Co. v. North Carolina* (1898) 171 U. S. 345; *Lemieux v. Young* (1909) 211 U. S. 489; *North American Cold Storage Co. v. Chicago* (1909) 211 U. S. 306; *Waters-Pierce Co. v. DeSelms* (1909) 212 U. S. 159; *Williams v. Arkansas* (1910) 217 U. S. 79; *Natal v. Louisiana* (1891) 139 U. S. 621; *Pittsburgh etc. Coal Co. v. Louisiana* (1895) 156 U. S. 590; *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 U. S. 61; *Sperry etc. Co. v. Rhodes* (1911) 220 U. S. 502; *House v. Mayes* (1911) 219 U. S. 270; *Lawton v. Steele* (1899) 152 U. S. 133; *New York v. Hesterberg* (1909) 211 U. S. 31; *Geer v. Connecticut* (1896) 161 U. S. 519.

GAMBLING LEGISLATION.

The Supreme Court has upheld every State gambling, bucket shop, and anti-grain-option law brought before it, as follows:—

Illinois law against dealing in options in grain, etc. (1902); California sales on margin law (1903); gaming instrument and policy law of New York (1904); California gambling law (1905); Ohio law imposing liability on owner of building used for gambling (1905); bucket-shop law of North Carolina (1906); Missouri law taxing sale of grain, stock, etc. for future delivery (1911).¹¹

LIQUOR AND CIGARETTE LEGISLATION.

The Supreme Court has upheld State liquor, prohibition, license and local option laws and anti-cigarette laws as follows:—

The prohibition law of Kansas (1887); the liquor laws abating distilleries as a nuisance, of Iowa (1888) (1889); the liquor license laws of California (1890), of Alabama (1908); liquor laws of Texas (1893), of Nebraska (1892), of Ohio (1900); local option laws of Texas (1904) (1906), of Ohio (1904); sales of liquor to women, of Colorado (1904); transfer of liquor license in Massachusetts (1907); Illinois ordinance against sale of cigarettes (1900); laws against sale of cigarettes, of Tennessee (1900), of Iowa (1905); law of Virginia revoking charter of a club for illegal liquor sales (1908).¹²

CATTLE LEGISLATION.

The Supreme Court has upheld State statutes regulating the cattle industry and cattle diseases as follows:—

Iowa law fixing absolute liability on all persons having Texas

¹¹*Booth v. Illinois* (1902) 184 U. S. 425; *Otis v. Parker* (1903) 187 U. S. 606; *Adams v. New York* (1904) 192 U. S. 585; *Ah Sin v. Wittman* (1905) 198 U. S. 500; *Marvin v. Tront* (1905) 199 U. S. 212; *Gatewood v. North Carolina* (1906) 203 U. S. 531; *Brodnax v. Missouri* (1911) 219 U. S. 285.

¹²*Mugler v. Kansas* (1887) 123 U. S. 623; *Kidd v. Pearson* (1888) 128 U. S. 1; *Eilenbecker v. Plymouth County District* (1890) 134 U. S. 31; *Crawley v. Christiansen* (1890) 137 U. S. 86; *Phillips v. Mobile* (1908) 208 U. S. 472; *Giozza v. Tiernan* (1893) 148 U. S. 657; *Mette v. McGuckin* (1885) 18 Neb. 323, aff. (1892) 149 U. S. 781; *Reyman Brewing Co. v. Brister* (1900) 179 U. S. 445; *Riphey v. Texas* (1904) 193 U. S. 504; *Ohio v. Dollison* (1904) 194 U. S. 445; *Cronin v. Adams* (1904) 192 U. S. 108; *Cox v. Texas* (1906) 202 U. S. 446; *Tracy v. Ginzberg* (1907) 205 U. S. 170; *Gundling v. Chicago* (1900) 177 U. S. 183; *Austin v. Tennessee* (1900) 179 U. S. 343; *Hodge v. Muscatine County* (1905) 196 U. S. 276; *Cook v. Marshall County* (1905) 196 U. S. 261; *Cosmopolitan Club v. Virginia* (1908) 208 U. S. 378.

cattle and spreading Texas fever (1889); Utah Act for damages to highway by driving animals (1897); live stock sanitary commission and cattle quarantine law of Texas (1901); Colorado cattle disease law (1902); Idaho law of liability for damages by sheep grazing within two miles of a house (1907).¹³

LAWS RESTRICTING FREEDOM OF CONTRACT AND ACTION IN INDIVIDUALS.

In addition to the foregoing, the Supreme Court has sustained State statutes brought before it regulating the exercise of personal, social or economic rights—*i. e.*, limiting or regulating an individual's liberty of contract or of action, or of conduct of business in behalf of the general welfare of the community. A single exception to its uniform upholding of such laws was the statute of Louisiana restricting rights of owners of cotton to use the mail to obtain insurance in foreign insurance corporations.¹⁴

The following regulative legislation has been upheld:—

West Virginia act licensing physicians (1889); Connecticut druggist license act (1895); registration of physicians acts of Michigan (1903), of Maryland (1910); carrying concealed weapons law of Texas (1894); Massachusetts law requiring license for speaking in public places (1897); Utah ordinance as to moving buildings on public streets (1899); Indiana law prohibiting waste in flow of gas and oil (1900); Louisiana ordinance fixing geographical limits for houses of ill fame (1900); Minnesota barber shop law (1900); alimony law of New York (1901); lunacy law of Alabama (1901); Louisiana quarantine law (1902); Missouri law fixing limits for cow stables (1904); compulsory vaccination law of Massachusetts (1905); laws granting exclusive right to dispose of garbage, of California (1905), of Michigan (1905); California law requiring keepers of places of amusement to admit all ticket holders (1907); law against use of flag for advertising purposes, of Nebraska (1907); law of Arkansas requiring negotiable instrument taken in payment for sale of patented article to state on face for what it was given (1907); Massachusetts laws restricting height of buildings (1903) (1909); Connecticut law forbidding loans for more than 15% (1910);

¹³*Kimmish v. Ball* (1889) 129 U. S. 217; *Jones v. Brim* (1897) 165 U. S. 180; *Smith v. St. Louis etc. R. R.* (1901) 181 U. S. 248; *Reid v. Colorado* (1902) 187 U. S. 137; *Bacon v. Walker* (1907) 204 U. S. 311; *Bown v. Walling* (1907) 204 U. S. 320.

¹⁴*Allgeyer v. Louisiana* (1897) 165 U. S. 578.

California law restricting burials in city (1909); Minnesota law imposing double damages on trespassers on State lumber lands (1910); New York law forbidding advertising on street vehicles (1911); New York law forbidding unauthorized use of portraits for advertising (1911); Massachusetts law regulating assignments of wages (1911); Illinois law imposing liability for damages from riots on municipalities (1911); Texas law restricting pilots (1909).¹⁵

REGULATION OF RAILROADS AND RAILROAD RATES.

The Supreme Court has upheld State statutes regulating railroad rates and the management of railroads, as follows:—

Rates.

The railroad rate acts of Arkansas (1888) (1895), of Georgia (1888), of Michigan (1892), of South Dakota (1900); long and short haul railroad commission law of Kentucky (1902); rates of Minnesota (1902); freight rates, of Florida (1906); grain rates of Mississippi (1906); school children half-fare law of Massachusetts (1907).¹⁶

¹⁵*Dent v. West Virginia* (1889) 129 U. S. 114; *Gray v. Connecticut* (1895) 159 U. S. 74; *Reetz v. Michigan* (1903) 188 U. S. 505; *Watson v. Maryland* (1910) 218 U. S. 173; *Miller v. Texas* (1894) 153 U. S. 535; *Davis v. Massachusetts* (1897) 167 U. S. 43; *Wilson v. Eureka City* (1899) 173 U. S. 32; *Ohio Oil Co. v. Indiana* (1900) 177 U. S. 190; *L'Hote v. New Orleans* (1900) 177 U. S. 587; *Petit v. Minnesota* (1900) 177 U. S. 164; *Lynde v. Lynde* (1901) 181 U. S. 183; *Simon v. Craft* (1901) 182 U. S. 427; *Compagnie Francaise v. State Board of Health* (1902) 186 U. S. 380; *Fischer v. St. Louis* (1904) 194 U. S. 361; *Jacobson v. Massachusetts* (1905) 197 U. S. 11; *California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306; *Gardner v. Michigan* (1905) 199 U. S. 325; *Western Turf Ass'n v. Greenberger* (1907) 204 U. S. 359; *Halter v. Nebraska* (1907) 205 U. S. 34; *Osan Lumber Co. v. Union County* (1907) 207 U. S. 201; *Welch v. Swasey* (1909) 214 U. S. 91; *Griffith v. Connecticut* (1910) 218 U. S. 563; *Kidd v. Musselman Grocer Co.* (1910) 217 U. S. 461; *Laurel Hill Cemetery v. San Francisco* (1910) 216 U. S. 358; *Sherwin Carpenter Co. v. Minnesota* (1910) 218 U. S. 57; *Re Gregory* (1911) 219 U. S. 210; *Fifth Ave. Coach Co. v. New York* (1911) 221 U. S. 467; *Mutual Loan Co. v. Martell* (1911) 222 U. S. 225; *Chicago v. Sturgis* (1911) 222 U. S. 313; *Olsen v. Smith* (1904) 195 U. S. 332.

¹⁶*Dow v. Beidelman* (1888) 125 U. S. 680; *Georgia R. R. v. Smith* (1888) 128 U. S. 174; *Chicago etc. R. R. v. Wellman* (1892) 143 U. S. 339; *Chicago etc. R. R. v. Tompkins* (1900) 176 U. S. 167; *St. Louis R. R. v. Gill* (1895) 156 U. S. 649; *Louisville & N. R. R. v. Kentucky* (1902) 183 U. S. 503; *Minneapolis etc. R. R. v. Minnesota* (1902) 186 U. S. 257; *Seaboard Air Line R. R. v. Florida* (1906) 203 U. S. 261; *Alabama & Vicksburg R. R. v. Mississippi* (1906) 203 U. S. 496; *Interstate Consol. St. Ry. v. Massachusetts* (1907) 207 U. S. 79.

General Management.

Law of Alabama forbidding employment of color-blind persons and requiring railroads to pay examination fees (1888); law of Iowa fixing double damages for cattle killed on railroads neglecting to fence (1889); law of Minnesota fixing treble damages for failure to fence tracks (1893); Georgia law stopping freight trains on Sunday (1896); Missouri and Kansas laws imposing liability for fire from locomotives (1897) (1899); Minnesota law requiring trains to stop at county seats (1897); New York law forbidding heating of cars by stoves (1897); Illinois law requiring flags, gates, etc. at crossings (1897); Arkansas law requiring railroads to pay all unpaid wages to employees when discharged (1899); Ohio law requiring trains to stop at stations of over 3,000 inhabitants (1899); Kansas city ordinance as to speed of trains (1900); Minnesota law requiring track connections of intersecting roads (1900); Nebraska law fixing absolute liability on railroads for injuries to passengers (1902); Michigan law as to safety appliances on railroad crossings (1903); Minnesota law requiring establishment of stations (1904); Texas law penalizing railroads for allowing Johnson grass or Russian thistle to go to seed (1904); order requiring connecting trains, of North Carolina (1907); requiring railroads to adjust claims for damage to shipments within 40 days, of South Carolina (1907); Kansas law requiring certain trains to run (1909); Mississippi order to operate spur tracks (1908); Minnesota law requiring railroad to construct bridge over street (1909).¹⁷

¹⁷Nashville etc. R. R. v. Alabama (1888) 128 U. S. 96; Minneapolis etc. R. R. v. Beckwith (1889) 129 U. S. 26; Minneapolis etc. R. R. v. Emmons (1893) 149 U. S. 364; Hennington v. Georgia (1896) 163 U. S. 299; St. Louis etc. R. R. v. Mathews (1897) 165 U. S. 1; A. T. & S. F. R. R. v. Matthews (1899) 174 U. S. 96; Gladson v. Minnesota (1897) 166 U. S. 427; N. Y., N. H. & H. R. R. v. New York (1897) 165 U. S. 628; C. B. & Q. R. R. v. Chicago (1897) 166 U. S. 226; St. Louis etc. R. R. v. Paul (1899) 173 U. S. 404; Lake Shore etc. R. R. v. Ohio (1899) 173 U. S. 285; Erb v. Morasch (1900) 177 U. S. 584; Wisconsin etc. R. R. v. Jacobson (1900) 179 U. S. 287; Chicago etc. R. R. v. Zernecke (1902) 183 U. S. 582; Detroit etc. R. R. v. Osborn (1903) 189 U. S. 383; Minneapolis etc. R. R. v. Minnesota (1904) 193 U. S. 53; Missouri etc. R. R. v. May (1904) 194 U. S. 257; Atlantic Coast Line R. R. v. North Carolina (1907) 206 U. S. 1; Seaboard Air Line R. R. v. Seeger (1907) 207 U. S. 73; Missouri Pacific R. R. v. Kansas (1910) 216 U. S. 262; Mobile etc. R. R. v. Mississippi (1908) 210 U. S. 187; St. Paul etc. R. R. v. Minnesota (1909) 214 U. S. 497.

CORPORATION RATES.

The Supreme Court has upheld statutes fixing or regulating rates for public service corporations, other than railroads, as follows:—

New York law regulating charges of grain elevators (1892); North Dakota grain warehouse act (1894); reasonableness of water rates of California (1899) (1900) (1903) (1904); water rates of Illinois (1901); forfeiture of charter of waterworks company for illegal rates by Louisiana court (1902); telephone rate law of California (1909); gas rates of New York (1909); water rates of Tennessee (1903) (1909).¹⁸

REGULATION OF BANKS.

The Supreme Court has upheld every State banking regulation statute brought before it, as follows:—

Bank guaranty fund laws of Oklahoma, Kansas and Nebraska (1911); Massachusetts law forfeiting to the State unclaimed bank deposits (1911); New York law licensing private bankers (1911).¹⁹

REGULATION OF INSURANCE AND TELEGRAPH CORPORATIONS.

The Supreme Court has upheld State statutes regulating the business and methods of insurance and telegraph companies, as follows:—

Missouri act compelling insurance companies to pay the full amount for which property was insured, in case of total loss (1899); Missouri non-forfeitable policy law (1900); acts abolishing defense of false representations by insurers unless wilful and connected with the loss, of Ohio (1901), of Missouri (1906); acts forbidding insurance agents from effecting insurance in unau-

¹⁸*Budd v. New York* (1892) 143 U. S. 517; *Brass v. North Dakota* (1894) 153 U. S. 391; *San Diego Land Co. v. National City* (1899) 174 U. S. 739; *Osborn v. San Diego etc. Co.* (1900) 178 U. S. 22; *San Diego Land Co. v. Jasper* (1903) 189 U. S. 439; *Stanislaus County v. Irrigation Co.* (1904) 192 U. S. 201; *Freeport Water Co. v. Freeport* (1901) 180 U. S. 587; *New Orleans Water Works Co. v. Louisiana* (1902) 185 U. S. 336; *Home Tel. & Tel. Co. v. Los Angeles* (1909) 211 U. S. 265; *Wilcox v. Consol. Gas Co.* (1909) 212 U. S. 19; *Knoxville Water Co. v. Knoxville* (1903) 189 U. S. 434; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1.

¹⁹*Noble State Bank v. Haskell* (1911) 219 U. S. 104; *Shallenberger v. First State Bank* (1911) 219 U. S. 114; *Assaria State Bank v. Dolley* (1911) 219 U. S. 121; *Providence Inst. for Savings v. Malone* (1911) 221 U. S. 660; *Engel v. O'Malley* (1911) 219 U. S. 128.

thorized foreign companies, of California (1895), of Massachusetts (1902); Texas act imposing 12% additional damage and attorneys' fees on life and health companies failing to pay loss within specified time (1902); Nebraska valued policy law, and act allowing attorneys' fees (1903); Missouri act excluding suicide as a defense on life insurance policies (1907); Alabama act compelling insurance companies entering into any rate-fixing association to pay to insured additional 25% of loss (1911); Georgia law as to diligence in delivery of telegrams (1896); Michigan law forbidding telegraph companies to limit liability for negligent failure to deliver (1910); New York law for reorganization of an insurance association (1907); Kentucky law withdrawing license of any foreign insurance company removing case to Federal courts (1906).²⁰

PUBLIC IMPROVEMENTS.

The Supreme Court has upheld State statutes authorizing undertakings of a public nature such as drainage, levees, grade crossings and irrigation; and it has uniformly held that such improvements, even if interfering with private property, were within the police power of the State:—

Public dam acts of Wisconsin (1891) and Minnesota (1897); improved waterway tolls act of Michigan (1887); Pennsylvania railroad construction act (1894); Connecticut grade-crossing act (1894); District of Columbia land drainage law (1897); Louisiana levee act (1895); Massachusetts swamp drainage act (1895); California irrigation ditch act (1897); Ohio act changing street grades (1897); street obstruction ordinance of Virginia (1898); Connecticut act assessing certain towns for cost of bridge (1898); Minnesota log lien act (1900); forest preserve act of New York (1900); New York grade-crossing act (1900); construction of waterworks act of New York (1902); drainage act

²⁰New York Life Ins. Co. v. Cravens (1900) 178 U. S. 389; Orient Ins. Co. v. Daggs (1899) 172 U. S. 557; John Hancock Life Ins. Co. v. Warren (1901) 181 U. S. 73; N. W. Life Ins. Co. v. Riggs (1906) 203 U. S. 243; Hooper v. California (1895) 155 U. S. 648; Nutting v. Massachusetts (1902) 183 U. S. 553; Fidelity Mut. Life Ins. Co. v. Mettler (1902) 185 U. S. 308; Iowa Life Ins. Co. v. Lewis (1902) 187 U. S. 335; Farmers Ins. Co. v. Dobney (1903) 189 U. S. 301; Whitfield v. Aetna Life Ins. Co. (1907) 205 U. S. 489; German Alliance Ins. Co. v. Hale (1911) 219 U. S. 307; W. U. Tel. Co. v. James (1896) 162 U. S. 650; W. U. Tel. Co. v. Com. Milling Co. (1910) 218 U. S. 406; Security Mut. Life Ins. Co. v. Prewitt (1906) 202 U. S. 246; Polk v. Mut. etc. Ass'n (1907) 207 U. S. 310; see also W. U. Tel. Co. v. New Hope (1903) 187 U. S. 419; Postal Tel. Co. v. New Hope (1904) 192 U. S. 55.

of Louisiana (1905); purchase of waterworks act of Massachusetts (1909); mill flowage acts of Massachusetts (1906); South Carolina dam act (1905); wharf act of Oregon (1906); Utah eminent domain law, allowing condemnation of right of way across placer claims for aerial bucket (1906); Utah law allowing condemnation of land for irrigation (1905); New York law for erection of viaduct in city street without compensation to abutters (1907); Connecticut law allowing railroads owning three-quarters of stock of other railroads to condemn remaining shares (1906); New Jersey law against diverting water into another State (1908); Virginia law allowing railroads to condemn land for spur track to a private industry (1908); Pittsburgh and Alleghany consolidation law of Pennsylvania (1907); nominal damages for land taken on bed of navigable stream, of New York (1911).²¹

TAXATION LAWS.

Besides the above statutes, there have been over one hundred State laws relating to taxation brought before the United States Supreme Court in cases appealed under the "due process" and "equal protection of the laws" clauses of the Constitution. With the exceptions hereinafter noted, the Court has upheld every variety of tax law, as follows:—

Corporation and franchise taxes,²² inheritance and legacy

²¹*Kaukama etc. Co. v. Greenberg etc. Co.* (1891) 142 U. S. 254; *St. Anthony etc. Co. v. Board* (1897) 168 U. S. 349; *Sands v. Manistee River Imp. Co.* (1887) 123 U. S. 288; *Marchant v. Penn. R. R. Co.* (1894) 153 U. S. 380; *Bauman v. Ross* (1897) 167 U. S. 548; *Eldredge v. Trezevant* (1895) 160 U. S. 452; *N. Y. & N. E. R. R. Co. v. Bristol* (1894) 151 U. S. 556; *Sweet v. Rechel* (1895) 159 U. S. 380; *Fall Brook Irrigation District v. Bradley* (1897) 164 U. S. 112; *Wabash R. R. v. Defiance* (1897) 167 U. S. 88; *Meyer v. Richmond* (1898) 172 U. S. 82; *Williams v. Eggleston* (1898) 170 U. S. 304; *Lindsey etc. Co. v. Mullen* (1900) 176 U. S. 126; *Adirondacks Ry. Co. v. New York* (1900) 176 U. S. 335; *Newburyport Water Co. v. Newburyport* (1904) 193 U. S. 561; *Wheeler v. N. Y. N. H. & H. R. R.* (1900) 178 U. S. 321; *Skaneateles Water Co. v. Skaneateles* (1902) 184 U. S. 354; *New Orleans Gas Light Co. v. N. O. Drainage Com.* (1905) 197 U. S. 453; *Otis Co. v. Ludlow Mfg. Co.* (1906) 201 U. S. 140; *Manigault v. Springs* (1905) 199 U. S. 473; *Mead v. Portland* (1906) 200 U. S. 148; *Strickley v. Highland Boy Gold Min. Co.* (1906) 200 U. S. 527; *Clark v. Nash* (1905) 198 U. S. 361; *Sauer v. New York* (1907) 206 U. S. 536; *Offield v. N. Y., N. H. & H. R. R.* (1906) 203 U. S. 372; *Hudson County Water Co. v. McCarter* (1908) 209 U. S. 349; *Hairston v. Danville etc. R. R. Co.* (1908) 208 U. S. 598; *Hunter v. Pittsburg* (1907) 207 U. S. 161; *Appleby v. Buffalo* (1911) 221 U. S. 524.

²²*New York bank tax and corporation tax, Palmer v. McMahon* (1890) 133 U. S. 660; *Home Ins. Co. v. New York* (1890) 134 U. S. 594; *Missouri, Ohio, Kentucky and Indiana express company tax acts, Pacific Express Co. v. Seibert* (1892) 142 U. S. 339; *Adams Express Co. v. Ohio* (1897) 165 U.

taxes,²³ license taxes,²⁴ railroad taxation,²⁵ street and sewer betterment assessments,²⁶ and general property taxes.²⁷

S. 194, *Adams Express Co. v. Kentucky* (1897) 166 U. S. 171, *American Express Co. v. Indiana* (1897) 165 U. S. 255; *Indiana telegraph company tax*, W. U. Tel. Co. *v. Indiana* (1897) 165 U. S. 304; *State bank tax of Pennsylvania*, *Merchants etc. Bank v. Pennsylvania* (1897) 167 U. S. 451; *foreign corporation tax acts of Pennsylvania and New York*, *Pembina Silver Min. Co. v. Pennsylvania* (1888) 125 U. S. 181, *New York v. Roberts* (1898) 171 U. S. 658; *Kentucky bridge corporation tax*, *Henderson Bridge Co. v. Henderson* (1899) 173 U. S. 592; *Connecticut corporation tax*, *Travelers Ins. Co. v. Connecticut* (1902) 185 U. S. 364; *Kentucky franchise tax*, *Coulter v. Louisville & N. R. R.* (1905) 196 U. S. 599; *insurance company credit tax of Louisiana*, *Met. Life Ins. Co. v. New Orleans* (1907) 205 U. S. 395, *Board v. N. Y. Life Ins. Co.* (1910) 216 U. S. 517; *Louisiana tax on premiums and notes due foreign insurance companies*, *Liverpool etc. Ins. Co. v. Board* (1911) 221 U. S. 346; *New York franchise tax*, *N. Y. C. R. R. v. Miller* (1906) 202 U. S. 584; *Ohio consolidation of railroads tax*, *Ashley v. Ryan* (1894) 153 U. S. 436; *Indiana telegraph company tax*, *W. U. Tel. Co. v. Taggart* (1896) 163 U. S. 1; *Kentucky bank tax*, *Citizens National Bank v. Kentucky* (1910) 217 U. S. 443, *Citizens Sav. Bank v. Owensboro* (1899) 173 U. S. 636; *Colorado refrigerator car tax*, *Amer. etc. Co. v. Hall* (1899) 174 U. S. 70. See also note 27 *infra*.

²³*Magoun v. Illinois Trust & Savings Bank* (1898) 170 U. S. 283; *Billings v. Illinois* (1903) 188 U. S. 97; *Blackstone v. Miller* (1903) 188 U. S. 189; *Campbell v. California* (1906) 200 U. S. 87; *Chanler v. Kelsey* (1907) 205 U. S. 466; *Beers v. Glynn* (1909) 211 U. S. 477; *Cahen v. Brewster* (1906) 203 U. S. 543.

See also *Scudder v. Coler* (1899) 175 U. S. 32; *Orr v. Gilman* (1902) 183 U. S. 278; *Board of Education v. Illinois* (1905) 203 U. S. 553; *Moffitt v. Kelley* (1910) 218 U. S. 400.

²⁴*Dog valuation law of Louisiana*, *Sentell v. N. O. etc. R. R. Co.* (1897) 166 U. S. 698; *license tax of Georgia on emigrant agents*, *Ficklen v. Shelby County* (1892) 145 U. S. 1, *Williams v. Fears* (1900) 179 U. S. 270; *Louisiana tax on sugar refiners*, *Amer. Sugar Ref. Co. v. Louisiana* (1900) 179 U. S. 89; *Minnesota tax on elevators and warehouses*, *Cargill Co. v. Minnesota* (1901) 180 U. S. 452; *classified merchants license tax of Pennsylvania*, *Clark v. Titusville* (1902) 184 U. S. 329; *merchants' tax of Tennessee*, *Amer. Steel & Wire Co. v. Speed* (1904) 192 U. S. 500; *non-resident meat packer tax of Georgia and North Carolina*, *Kehrer v. Stewart* (1905) 197 U. S. 60, *Armour Packing Co. v. Lacy* (1906) 200 U. S. 226; *Texas license tax on wholesale dealers in oils*, *S. W. Oil Co. v. Texas* (1910) 217 U. S. 114; *Kentucky license tax on distillers*, *Brown Forman Co. v. Kentucky* (1910) 217 U. S. 563, *Thompson v. Kentucky* (1908) 209 U. S. 340.

²⁵*Taxing railroads for salary of State railroad commissioners in South Carolina and New York*, *Charlotte etc. R. R. v. Gibbes* (1892) 142 U. S. 386, *New York Electric Lines v. Squire* (1892) 145 U. S. 175; *Georgia Railroad tax law*, *Columbus Ry. Co. v. Wright* (1894) 151 U. S. 470; *imposing cost of repairs and maintenance of safe viaduct on railroads in Nebraska*, *C. B. & Q. R. R. v. Nebraska* (1898) 170 U. S. 57; *railroad grade-crossing law of New York*, *Wheeler v. N. Y., N. H. & H. R. R.* (1900) 178 U. S. 321; *Florida act assessing back taxes on railroads*, *Florida etc. R. R. v. Reynolds* (1902) 183 U. S. 471; *Alabama tax on foreign railroad stock*, *Kidd v. Alabama* (1903) 188 U. S. 730; *street railway tax of Georgia*, *Savannah Ry. v. Savannah* (1905) 198 U. S. 392; *Illinois laws imposing on railroads cost of removing and rebuilding bridges and removing tunnel*, *C. B. & Q. R. R. v. Illinois* (1905) 200 U. S. 551, *West*

The Court has also upheld, under these same clauses of the Constitution, a large number of cases involving State statutory civil and criminal court procedure, and general political rights.²⁸

Chicago Street R. R. *v.* Illinois (1906) 201 U. S. 506; street railway franchise tax of New York, *New York v. State Board* (1905) 199 U. S. 1; Indiana law imposing cost of bridge on railroad, *Cincinnati etc. Ry. v. Connersville* (1910) 218 U. S. 336; Indiana railroad tax, *Pittsburg etc. R. R. v. Backus* (1894) 154 U. S. 421; Michigan railroad tax, *Michigan Central R. R. Co. v. Powers* (1906) 201 U. S. 245; Nebraska railroad tax, *C. B. & Q. R. R. v. Babcock* (1907) 204 U. S. 585; Kentucky railway franchise, *Illinois etc. R. R. v. Kentucky* (1910) 218 U. S. 551.

²⁸*Walston v. Nevin* (1888) 128 U. S. 578; *Essex Public Road Board v. Skinkle* (1891) 140 U. S. 334; *Paulsen v. Portland* (1893) 149 U. S. 30; *Parsons v. Dist. of Col.* (1898) 170 U. S. 45; *Weyerhaeuser v. Minnesota* (1900) 176 U. S. 550; *Lombard v. West Chicago Park Com.* (1901) 181 U. S. 33; *French v. Barber Asphalt Paving Co.* (1901) 181 U. S. 324, and 7 following cases: *Cass Farm Co. v. Detroit* (1901) 181 U. S. 396; *Voight v. Detroit* (1902) 184 U. S. 115; *Goodrich v. Detroit* (1902) 184 U. S. 432; *King v. Portland* (1902) 184 U. S. 61; *Chadwick v. Kelly* (1903) 187 U. S. 540; *Schaefer v. Werling* (1903) 188 U. S. 516; *Seattle v. Kelleher* (1904) 195 U. S. 351; *Louisville & N. R. R. v. Barber Asphalt Co.* (1905) 197 U. S. 430; *Briscoe v. Rudolph* (1911) 221 U. S. 547; *Carson v. Brockton* (1901) 182 U. S. 398; *Hibben v. Smith* (1903) 191 U. S. 310; *Cleveland etc. R. R. v. Porter* (1908) 210 U. S. 177.

²⁹*Pennsylvania tax law, Bell's Gap R. R. v. Pennsylvania* (1890) 134 U. S. 232; mortgage tax laws of Oregon and New York, *Savings etc. Society v. Multnomah County* (1898) 169 U. S. 421, *Paddell v. New York* (1908) 211 U. S. 446; laws forfeiting land for unpaid taxes, of West Virginia and Kentucky, *King v. Mullins* (1898) 171 U. S. 404, *Kentucky Union Co. v. Kentucky* (1911) 219 U. S. 140; Minnesota and Louisiana taxes on investments by a non-resident, *Bristol v. Washington County* (1900) 177 U. S. 133, *New Orleans v. Stempel* (1899) 175 U. S. 309; Pennsylvania tax on estates of absentees, *Cunnius v. Reading School District* (1905) 198 U. S. 458; Maryland tax on non-resident stockholders, *Corry v. Baltimore* (1905) 196 U. S. 466; Maryland tax on liquors in warehouses, *Carstairs v. Cochran* (1904) 193 U. S. 10; Ohio tax on bonds deposited by insurance companies, *Scottish Ins. Co. v. Boland* (1905) 196 U. S. 611; New York stock transfer act, *New York v. Reardon* (1907) 204 U. S. 152; Kentucky tax on ocean-going steamships, *Southern Pacific Co. v. Kentucky* (1911) 222 U. S. 63; Louisiana tax on credits on collateral security loans, *State Board v. Comptoir National D'Escompte* (1903) 191 U. S. 388; levee tax law of Arkansas, *Ballard v. Hunter* (1907) 204 U. S. 241.

³⁰For a few of the statutes of more general interest see, claims of foreign corporations as creditors law of Tennessee, *Blake v. McClung* (1898) 172 U. S. 239; Massachusetts attachment law, *Rothschild v. Knight* (1902) 184 U. S. 334; Maryland insolvent law, *Brown v. Smart* (1892) 145 U. S. 454; trustee process law of Rhode Island, *King v. Cross* (1899) 175 U. S. 390; non-resident mortgagee claims law of Tennessee, *Sully v. Amer. Nat. Bank* (1900) 178 U. S. 289; Maine disseizin law, *Soper v. Lawrence Bros. Co.* (1906) 201 U. S. 359; corporation act of West Virginia, *St. Mary's etc. Co. v. West Virginia* (1906) 203 U. S. 183; California law for quieting title, *Amer. Land Company v. Zeiss* (1911) 219 U. S. 47; Massachusetts absentee estate act, *Blinn v. Nelson* (1911) 222 U. S. 1; registration of voters in classified cities of Missouri, *Mason v. Missouri* (1900) 179 U. S. 328; city annexation act of Kansas, *Clark v. Kansas City* (1900) 176 U. S. 114; incorporation of a city, of Texas, *Lampasas v. Bell* (1901) 180 U. S. 276; new school district of Michigan, *Kils v. Lowrey* (1905) 199 U. S.

Now, as pointed out above, notwithstanding this mass of cases appealed and decided under the Fourteenth Amendment, in which cases parties have sought to overthrow State laws—over 560 in number between 1887 and 1911—it is remarkable that the Court has held unconstitutional only three State statutes dealing with general social or economic conditions, *i. e.*, “social justice” laws. In addition, it is true, it has held unconstitutional several instances of State legislation or of State action which involved simply private rights of property, *i. e.*, questions of illegal taxation and of other forms of actual taking of private property without compensation. No one claims, however, that the recall of judicial decisions or other radical remedies should be applied to court decisions which simply adjudicate private property rights.

Even in cases of this nature, the Court has held State laws or State action unconstitutional and void in only 34 instances during the past 25 years, as follows:—

One street assessment tax act;²⁹ 6 acts authorizing taxes, court judgments or disposition of property without hearing or reasonable notice to property owners;³⁰ 1 act regarding enforcement of mortgages;³¹ 8 acts taxing property outside the jurisdiction of the State;³² 4 tax acts imposing unlawful discriminations or denying equal protection of the law;³³ 5 requirements of unreasonably low and confiscatory rates or tolls in Minnesota, Texas, Kentucky,

233; negro segregation laws of Louisiana, Georgia, Kentucky, *Plessy v. Ferguson* (1896) 163 U. S. 537, *Cumming v. Board of Education* (1899) 175 U. S. 528, *Berea College v. Kentucky* (1908) 211 U. S. 45, *Williams v. Mississippi* (1898) 170 U. S. 213, *Chiles v. C. & O. R. R.* (1910) 218 U. S. 71.

²⁹*Norwood v. Baker* (1898) 172 U. S. 269.

³⁰*Scott v. McNeal* (1894) 154 U. S. 34; *Roller v. Holly* (1900) 176 U. S. 398; *Central of Georgia R. R. v. Wright* (1907) 207 U. S. 127; *Londoner v. Denver* (1908) 210 U. S. 373; *National Exchange Bank v. Wiley* (1904) 195 U. S. 257; *Old Wayne Mutual Life Ass'n. v. McDonough* (1907) 204 U. S. 8.

³¹*Bradley v. Lightcap* (1904) 195 U. S. 1.

³²*Dewey v. Des Moines* (1898) 173 U. S. 193; *Louisville etc. Ferry Co. v. Kentucky* (1903) 188 U. S. 385; *Union Refrigerator Transit Co. v. Kentucky* (1905) 199 U. S. 194; *Fargo v. Hart* (1904) 193 U. S. 490; *Delaware etc. R. R. v. Pennsylvania* (1905) 198 U. S. 341; *Selliger v. Kentucky* (1909) 213 U. S. 200; *Buck v. Beach* (1907) 206 U. S. 392; *New Orleans v. New York Life Ins. Co.* (1910) 216 U. S. 517.

³³*Cotting v. Kansas City Stockyards Co.* (1901) 183 U. S. 79; *Raymond v. Chicago etc. Co.* (1907) 207 U. S. 20; *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400; *Stearns v. Minnesota* (1900) 179 U. S. 223; see also *Duluth etc. R. R. v. St. Louis County* (1900) 179 U. S. 302.

Nebraska and Pennsylvania;³⁴ 1 Minnesota railroad rate law, held invalid for excessive penalties and for failure to provide for a hearing;³⁵ and 7 laws depriving corporations of their property without compensation, as follows: a Nebraska order of a Board requiring a railroad to allow persons to erect an elevator on its property (1896); a Texas constitution depriving a railroad of a vested right (1898); a Michigan law requiring a railroad to issue and accept interchangeable mileage tickets with other roads (1899); a California ordinance forbidding the erection of gas works previously authorized (1904); an Ohio ordinance granting property of one street railway to another (1907); a Kentucky law requiring a railroad to deliver its cars to other roads (1909); a Nebraska law compelling construction of side tracks, etc., to private grain elevators, without a hearing (1910;³⁶ and 1 law of Texas requiring railroads losing suit to pay attorney's fees was held to deny equal protection of the law (1897).³⁷

It thus appears that, out of over 560 State statutes or other form of State action adjudicated upon under the "due process" and "equal protection" clauses during the last twenty-five years, the Court has upheld over 530; it has held invalid only 3 relating to "social justice," and only 34 relating to private rights of property.³⁸

³⁴*Chicago etc. Ry. Co. v. Minnesota* (1890) 134 U. S. 418; *Reagan v. Farmers Loan & Trust Co.* (1892) 154 U. S. 362; *Reagan v. Mercantile Trust Co.* (1894) 154 U. S. 413; *Covington Turnpike Co. v. Sandford* (1896) 164 U. S. 578; *Smyth v. Ames* (1898) 169 U. S. 465; see also *Prout v. Starr* (1903) 188 U. S. 537; *Postal Tel. Cable Co. v. New Hope* (1904) 192 U. S. 55.

³⁵*Ex parte Young* (1908) 209 U. S. 123.

³⁶*Missouri Pacific Ry. Co. v. Nebraska* (1896) 164 U. S. 403; *Houston v. T. C. R. R.* (1898) 170 U. S. 243; *Lake Shore etc. Ry. v. Smith* (1899) 173 U. S. 684; *Dobbins v. Los Angeles* (1904) 195 U. S. 223; *Cleveland etc. Ry. v. Cleveland* (1907) 204 U. S. 116; *Louisville & N. R. R. v. Central Stockyards Co.* (1909) 212 U. S. 132; *Missouri Pacific Ry. Co. v. Nebraska* (1910) 217 U. S. 196.

³⁷*Gulf etc. Ry. v. Ellis* (1897) 165 U. S. 150.

³⁸It may be fair to add that the following acts were also attacked as repugnant to the Fourteenth Amendment and were held unconstitutional; but the Court's decisions were based chiefly upon the ground that the acts were repugnant to the Federal powers over interstate commerce, *viz.*, tax laws of Kansas and Arkansas in *W. U. Tel. Co. v. Kansas* (1910) 216 U. S. 1, *Pullman Car Co. v. Kansas* (1910) 216 U. S. 56, *Ludwig v. W. U. Tel. Co.* (1910) 216 U. S. 146; natural gas law of Oklahoma, *Oklahoma v. Kansas Natural Gas Co.* (1911) 221 U. S. 229; or as being repugnant to the impairment of obligation of contract clause of the Constitution, *viz.*, *New York elevated railroad act*, *Muhlker v. N. Y. & H. R. R. Co.* (1905) 197 U. S. 544; railroad profit law of Indiana, *Terre Haute etc. R. R. v. Indiana* (1903) 194 U. S. 579.

The actual record of the Court thus shows how little chance a litigant has of inducing the Court to restrict the police power of a State, or to overthrow State laws under the "due process" clause; in other words, it shows the Court to be a bulwark to the State police power, not a destroyer. And while its actual record proves the responsiveness of the Court to the changing needs of the times, the words of its justices are quite as illuminating and encouraging. The modern attitude of the Court was well expressed by Judge Harlan in one of its late decisions, in 1911, in which he said:³⁹

"Among the powers of the State not surrendered is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States."

It has frequently been asserted by State courts and by law writers that the scope of the "police power" is confined to matters of public morals, public health and public safety. Such a restriction, however, finds no warrant in the late decisions of the Supreme Court, for, as Judge Harlan said in 1906:⁴⁰

"We hold that the police power of a State embraces regulations designed to *promote the public convenience or the general property as well as regulations designed to promote the public health, the public morals or the public safety.*"

The criterion of the State's power is the *public welfare* as viewed by the Legislature, for as said by Judge Hughes in 1911:⁴¹

In one case the Court held invalid an order of the Kentucky railroad commission, fixing a general tariff of railroad rates, but only because it exceeded its statutory authority, and not because the statute was deemed unconstitutional: see *Silver v. Louisville & N. R. R.* (1909) 213 U. S. 175.

In an Illinois gas rate case, *Peoria Gas Co. v. Peoria* (1906) 200 U. S. 98, the Court granted a temporary injunction, but did not decide whether the rates were confiscatory under the Fourteenth Amendment, referring the case to a master to find the facts; so also in a Virginia railroad rate case, *Prentiss v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, the Court merely held that it had jurisdiction, but did not invalidate the rates. In *Amer. Sugar Ref. Co. v. New Orleans* (1900) 181 U. S. 277, the Court upheld its jurisdiction, but did not decide on the validity of the tax involved.

³⁹*House v. Mayes* (1911) 219 U. S. 270.

⁴⁰*C. B. & Q. R. R. v. Illinois* (1906) 200 U. S. 561, 592.

⁴¹*C. B. & Q. R. R. v. McGuire* (1911) 219 U. S. 549.

"The right to make contracts * * * is subject also in the field of State action to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals *and welfare* of those subject to its jurisdiction."

And Judge Holmes in 1911 expresses the same view:⁴²

"It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In an able article in a recent law review, Judge Swayze of New Jersey says:⁴³

"The interpolation of the word 'welfare' in addition to the words health, safety and morals, seems likely to have important results."

It is apparent, however, from the whole trend of its recent opinions that the Court itself does not regard the addition of this word "welfare" as an "interpolation" or as the introduction of any change in the law which it had previously laid down. Thus Judge Holmes, in his opinion on the petition for rehearing of the Oklahoma bank guaranty case,⁴⁴ says, with reference to his prior decision:

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, *not* to give a new or wider scope to the power."

and Judge McKenna had already said in 1907,⁴⁵ referring to a previous case:

"In that case, we rejected the view that the police power cannot be exercised for the *general well being* of the community. That power, we said, embraces regulations designed to *promote the public convenience or the general prosperity*."

and in the latest decision of the Court on this subject, January 13, 1913, Judge Day has said, upholding a city ordinance of Chicago fixing the weight of bread loaves:⁴⁶

"This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power

⁴²Noble State Bank v. Haskell (1911) 219 U. S. 104, 110, 111.

⁴³26 Harv. L. Rev. 1, 13.

⁴⁴Noble State Bank v. Haskell (1911) 219 U. S. 575, 580.

⁴⁵Bacon v. Walker (1907) 204 U. S. 311, 317.

⁴⁶Schmidinger v. Chicago (1913) 226 U. S. 578.

fixing weights and measures and standards must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right of contract freely, because of restrictions upon that right deemed necessary *in the interest of the general welfare.*"

In this connection may be noticed the charge—often refuted but as often reasserted—that the Court bases its decisions on its own views of the policy of a State law, rather than on strict legal doctrines. The Court, however, has time and again announced the exact contrary; and in almost every decision of note in the last quarter of a century, it has emphasized the point that it has no concern whatever with the "wisdom" or "policy" of the legislation construed. Thus Judge Peckham in the *Lochner Case* said:

"This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the State, it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law."

Judge Harlan said, in 1911:⁴⁷

"Much may be done by a State under its police power which many may regard as an unwise exertion of governmental authority. But the Federal courts have no power to overturn such local legislation simply because they do not approve it or because they deem it unwise or inexpedient."

And Judge Holmes said in the Oklahoma bank case in 1911:⁴⁸

"We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation; but on that point we have nothing to say, *as it is not our concern.*"

When the people of this country know and realize the importance of these facts about its Supreme Court, the present agitation, based so largely on misconception, will die away; and all will agree with the patriotic sentiment expressed in 1828 by a paper strongly opposed in politics to the Court, during the heated States' Rights and Nullification period—a period of far more violent agitation against the Court than the present:⁴⁹

"Though the Constitutional construction of this lofty tribunal is not wholly conformable to our humble opinion of right, we have

⁴⁷*Brodnax v. Missouri* (1911) 219 U. S. 285.

⁴⁸*Noble State Bank v. Haskell* (1911) 219 U. S. 575.

⁴⁹*Niles Register*, Jan. 19th, 1828.

often thought that no person could behold this venerable body without profound respect for the virtue and talent concentrated on its bench ; and with a great degree of confidence that, as there must be some power in every government having final effect, it could hardly be vested anywhere more safely than in the Supreme Court as at present filled."

CHARLES WARREN.

Boston.